Wisconsin Laborers District Council *and* Miron Construction Co., Inc. and International Union of Operating Engineers, Local 139, AFL–CIO. Case 30–CD–145

December 8, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed June 12, 1992,[1] by Miron Construction Co., Inc. (Miron), alleging that the Respondent, Wisconsin Laborers District Council (Laborers District Council), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Miron to have its subcontractor, Bill Dentinger, Inc. (the Employer), continue to assign certain work to employees represented by Laborers International Union, Local 1086, AFL–CIO (Local 1086) rather than to employees represented by International Union of Operating Engineers, Local 139, AFL–CIO (Local 139). The hearing was held August 18 before Hearing Officer Janice K. Gifford. Miron, Laborers District Council, and Local 1086 filed posthearing briefs.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Bill Dentinger, Inc., a Wisconsin corporation, is a construction firm engaged in masonry subcontracting with its principal office in Town of Pewaukee, Wisconsin, where it annually purchases and receives goods, materials, and services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin.

Miron Construction Co., Inc., a Wisconsin corporation, is a construction firm with its principal office in Menasha, Wisconsin, where it annually purchases and receives goods, materials, and services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin.

The parties stipulate, and we find, that Bill Dentinger, Inc. and Miron Construction Co., Inc. are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers District Council, Local 1086, and Local 139 are labor organizations within the meaning of Section 2(5) of the Act.

[1] All subsequent dates refer to 1992 unless specified otherwise.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In December 1991, general contractor Miron was awarded the contract on the American Club construction project in Kohler, Wisconsin. In March 1992, Miron engaged the Employer as a masonry subcontractor on the project. The Employer assigned the operation of two mason-tending forklifts to employees represented by Local 1086. Miron has collective-bargaining agreements with both Local 1086 and Local 139. The Employer also has collective-bargaining agreements with both Local 1086 and Local 139.

The Employer used an employee represented by Local 139 to operate a crane at the worksite, but assigned the forklift work to employees represented by Local 1086. On March 19, Local 139 filed a grievance against Miron alleging that Miron ''subcontracted bargaining unit work covered by the . . . Agreement to a subcontractor not signatory to that agreement,'' and seeking payment for the work assigned to employees represented by Local 1086.[2] Laborers District Council sent Miron a letter, dated May 29, advising Miron and the Employer that it ''will strike and picket this project if the work is re-assigned to . . . Local 139.''

B. *Work in Dispute*

This disputed work involves the operation of mason-tending forklifts at the American Club jobsite in Kohler, Wisconsin.

C. *Contentions of the Parties*

Miron, Laborers District Council, and Local 1086 contend that there is reasonable cause to believe Laborers District Council violated Section 8(b)(4)(D) of the Act; no voluntary means exists for adjustment of the jurisdictional dispute; and the work in dispute should be awarded to employees represented by Local 1086 based on the factors of the Employer's preference and past practice, area practice, relative skills, and economy and efficiency of operations.

Although afforded notice and opportunity to appear at the hearing, Local 139 did not attend the hearing and did not file a posthearing brief. Consequently, Local 139 has made no contentions before the Board with respect to the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties

[2] The contract between Miron and Local 139 contains a clause providing that Miron will subcontract work ''only to a subcontractor who has signed, or is otherwise bound by, a written labor agreement entered into with [Local 139].''

have not agreed on a method for voluntary adjustment of the dispute. It is uncontroverted that Laborers District Council threatened to strike and picket both Miron and the Employer if the disputed work was reassigned to employees represented by Local 139. It is also undisputed that Local 139 filed a grievance seeking payment for the work assigned to employees represented by Local 1086. This grievance constitutes a competing claim for the disputed work. See *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990).[3] The record reveals no agreed method for voluntary adjustment of the dispute binding all parties; and Miron, the Employer, Laborers District Council, and Local 1086 stipulated that no such agreed method exists.

Based on the above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Collective-bargaining agreements

Miron, Laborers District Council, and Local 1086 acknowledge in their briefs that Local 1086's and Local 139's collective-bargaining agreements both claim the work in dispute and are not dispositive of the issue. Accordingly, we find that this factor favors an award of the work in dispute to neither group of employees.

2. Company preference and past practice

The Employer prefers that the work in dispute be performed by employees represented by Local 1086. The Employer, with only one exception, has assigned forklift work to employees represented by a Laborers union since the Employer began operations in 1975. We find that this factor favors an award to employees represented by Local 1086.

3. Area practice

Witnesses for the Employer and Local 1086 testified without contradiction that the overwhelming practice of employers in the Milwaukee area and in the State of Wisconsin has been to assign the work in dispute to employees represented by a Laborers union. We find that the factor of area practice favors an award of the work in dispute to employees represented by Local 1086.

4. Relative skills

The Employer and Local 1086 offered testimony that laborers are more skilled at operating the forklifts than operating engineers. However, the witnesses also acknowledged that the forklift is a simple machine to operate without significant training. Accordingly, we find that this factor favors an award of the work in dispute to neither group of employees.

5. Economy and efficiency of operations

The record reveals that forklift operators actively work only 2-1/2 to 3 hours per day. An operating engineer assigned to the forklift would have no other work at the jobsite while the forklift was idle, and would be precluded from performing other tasks. Laborers, however, are utilized for other work at the jobsite and can attend to those duties when they are not needed on the forklift. The Employer, therefore, will make greater use of laborers and have more work done on a given day by a laborer hired to operate the forklift than by an operating engineer. We find that this factor favors an award of the work in dispute to employees represented by Local 1086.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1086 are entitled to perform the work in the dispute. We reach this conclusion relying on the factors of employer preference and past practice, area practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 1086, not to that Union or its members.

Scope of Award

Miron, Laborers District Council, and Local 1086 request that the Board issue a broad work award on behalf of Laborers unions proscribing coercive claims by Operating Engineers unions in a geographical area equal to the territorial jurisdiction of the two competing labor organizations. They contend that such a

[3] Member Oviatt did not participate in *Slattery*. He does agree, however, with his concurring colleague that the instant case is distinguishable from *Slattery* in that here Local 139 failed to establish that the grievance it pursued was arguably meritorious. Accordingly, without deciding whether *Slattery* was correctly decided, Member Oviatt finds, in the circumstances of this case, that there is reasonable cause to believe that Local 139's grievance constitutes a claim for the disputed mason-tending forklift work.

broad award is necessary to avoid similar jurisdictional disputes.

The Board customarily declines to grant an areawide award in cases such as this in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Laborers (Paul H. Schwendener, Inc.)*, 304 NLRB 623 (1991). Accordingly, in the circumstances of this case we find no warrant for granting a broad award. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Bill Dentinger, Inc., represented by Laborers International Union, Local 1086, AFL–CIO, are entitled to operate the mason-tending forklifts at the American Club project in Kohler, Wisconsin.

CHAIRMAN STEPHENS, concurring.

In my dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), I stated that I would not find the pursuit of an arguably meritorious grievance for the breach of a union signatory subcontracting clause constituted a claim for work assigned by a subcontractor who was the beneficiary of the arguable breach. So long as a union did nothing more than announce its intent to pursue such a grievance and actually pursued it through the proper channels, I would quash the 10(k) notice on the ground that there was no jurisdictional dispute because of the absence of competing claims.

It is essential under my *Slattery* position, however, that the grieving union establish that it had an arguably meritorious claim that the subcontracting of the work in question violated the signatory subcontracting clause in an agreement between that union and the employer who subcontracted the work. In the present case, Local 139's grievance alleges that Miron subcontracted work to a subcontractor not signatory to an agreement with Local 139. Both testimony and exhibits presented at the hearing, however, indicate that the subcontractor, Bill Dentinger, Inc., *was* signatory to a collective-bargaining agreement with Local 139. This evidence suggests that Local 139's grievance against Miron is without basis. Local 139 made no appearance at the 10(k) hearing and filed no brief with the Board. Local 139 has therefore failed to establish that it was pursuing an arguably meritorious grievance. Accordingly, I agree with my colleagues that we are presented with a jurisdictional dispute. I further agree, for the reasons stated in the opinion for the majority, that the work should be awarded to employees represented by Local 1086 and that the award should be limited to the controversy that gave rise to this proceeding.